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Supreme Court of the United States

October Term, 1938

No. 118

PRINCESS LIDA OF THURN AND TAXIS, formerly Lida Eleanor Purcell Fitzgerald, and JOHN PURCELL FITZGERALD

Petitioners

against

GERALD PURCELL FITZGERALD, individually and as Trustee of the Trusts hereinafter described, *et al.*, etc.

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

I

The Questions Involved

The respondents must base the right of the State Court to enjoin the petitioners from proceeding with their Federal suit either (1) on the subject matter of the 1910 suit or else (2) on the so-called proceedings in the State Court which were docketed under the title of that suit after the judgment in that suit was completely satisfied and the mortgage given by the settlor concededly "paid and satisfied" (Rec. p. 150).

We challenge both these alleged sources of the alleged jurisdiction of the State Court to enjoin.

(1) If such jurisdiction be sought in the subject-matter of the 1910 suit, then the question is not whether the Court of Common Pleas had jurisdiction to make the orders (mostly *ex parte*) which it had made prior to the commencement of the suit in the Federal Court on July 8, 1930. On the contrary, the question is whether the State Court had jurisdiction to make, in the original 1910 action, *the order of June 29, 1937*, restraining these petitioners from the further prosecution of their Federal suit (Rec. pp. 104, 113, 116).

The petitioners clearly were within the Federal statute allowing suit in the Federal Court. There were both diversity of citizenship and the jurisdictional amount (Rec. p. 122).

At that time, the State Court had no fund *in custodia legis*. The power to appoint new trustees was expressly conferred *by the agreement of 1906* on the surviving trustees (Rec. p. 14); and counsel for respondents admitted on the argument that such an appointment was valid without subsequent judicial confirmation. Hence, the subsequent *ex parte* and *pro forma* confirmation by the court was merely gratuitous or precautionary, and could create no jurisdiction (not otherwise existing) to make the injunctive order of June 29, 1937.

Thus, the question is not whether the State Court could have entertained any suit for a voluntary or involuntary accounting, or could have restrained any interference with its jurisdiction of such a suit when lawfully perfected. No such suit was ever brought, and no such jurisdiction was ever perfected.

The State Court's injunctive order of June 29, 1937, professed to be made *in the old 1910 suit* (Rec. p. 113). It declared itself founded upon a petition of the substituted trustees, which petition recites (Rec. p. 104):

> *"This action was instituted October 27, 1910, by a bill entitled"*, etc.,

Indeed, the opinion of the Common Pleas granting the injunction opens with the statement (Rec. p. 116):

> *"The bill in this proceeding was filed October 27, 1910, and the cause has been since pending in this court."*

We challenge the correctness in law of the second half of the sentence. When the judgment in that action had been satisfied by full compliance therewith by the judgment debtor and his obligations under the 1906 agreement had thus been fully discharged on or before May 25, 1925, the only cause of action stated in the 1910 bill of complaint had been fully discharged, and there remained in the State Court no jurisdiction to be thereafter the sole and exclusive arbiter of *future* charges of *future* wrongdoing against *future* trustees for the whole *future* of the life of the trust.

A suit is not "pending" after judgment is entered and fully satisfied. (*Central National Bank* v. *Stevens*, 169 U. S. 432, 464).

(2) But even if this be otherwise, nevertheless the old 1910 suit could be still "pending" in 1937 only for the purposes for which it was brought. It could not be a perpetual grant to the State Court of exclusive jurisdiction over all future controversies between the parties or their successors. The purpose for which the 1910 suit was brought is obvious, to wit: *specific performance* by the settlor of the trust. Indeed, it was expressly so declared by the State Court itself in its opinion in 1911, granting the complainants a decree (Rec. p. 59):

> "In view of which facts and conditions (*i. e.* repudiation by the settlor), this proceeding was instituted and a bill of complaint filed setting forth sufficient of the situation and of the foregoing

facts to give this Court, sitting in Equity, jurisdiction; the prayer for relief is rather lengthy, consisting of seven paragraphs, but it can be condensed and the material substance of it expressed in one word, viz: '*performance*'".

Furthermore, the State Court in its 1911 opinion defined as the only issues, the following (Rec. p. 52):

(1) Is the 1906 agreement void, as claimed by the settlor?

(2) Did "*it* create a lien" on the settlor's property?

(3) If the agreement is valid, should the settlor be removed as trustee because of his repudiation of it?

The opinion thereupon discusses and decides these issues as issues solely between the settlor on the one hand and the other trustees and the beneficiaries on the other (Rec. pp. 52-92).

Plainly, therefore, that was the sole and only jurisdiction assumed by the State Court in 1910 according to its own definition thereof, and plainly that was the sole and only cause of action pleaded in the 1910 bill of complaint.

In consequence, the question here is how can that 1910 suit which went to judgment and satisfaction five years before the Federal suit was begun, give the State Court such exclusive jurisdiction over future wrongs (not pleaded in the 1910 bill and subsequently committed by future persons not parties to that suit), as to entitle that court to make *in that suit* an order in 1937 enjoining those petitioners from suing in the Federal Court such future persons for such future wrongs?

3. On the other hand, if jurisdiction for the State Court's injunctive order of June 29, 1937, be sought in the events shown on the docket after the decrees of the State Court in the 1910 action had been satisfied "in full of debt" and the mortgage "paid and satisfied" (Rec. p. 150, and Appendix B attached to our Main Brief), the following questions then arise:

(1) When did such jurisdiction begin?

(2) How could it have existed prior to the institution of the Federal suit on July 8, 1930?

(3) How and when could the 1910 suit in the State Court become a sort of suit in perpetuity, conferring on the State Court continuing and exclusive jurisdiction over all future controversies?

These questions are discussed in the ensuing Points of this Brief.

II

Shelby v. _Bacon_, 10 How. (U. S.) 56, is conclusive that, under the Pennsylvania law, the mere filing of the partial account on July 7, 1930, did not constitute institution of a suit by the trustees (—certainly not one _in rem_—), and did not confer exclusive jurisdiction on the State Court, and did not bar institution of the Federal suit on the following day.

The docket entries on pages 6 and 7 of the Record show that on October 9, 1925, the then trustees presented a "financial report to the Court"; that on December 2 and 5, 1925, "Affidavit of Publication filed"; and that on December 7, 1925, "no exceptions having been filed", the report and the partial account therein were "confirmed absolutely."

Page 7 of the Record further shows that on July 7, 1930, a "Second and Partial Account" was filed. *Nothing else was done on that day.* There is no mention of any publication or of the filing of any affidavit of publication, or of the issue of any process then or at any later time. All that appears is that *beginning several weeks later* several *ex parte orders* were successively made extending the time to file exceptions, and that on February 16, 1931, exceptions were filed by one Gerald Purcell Fitzgerald (not one of these petitioners). These exceptions appear never to have been made the subject of any determination.

The bill of complaint in the Federal Court was filed July 8, 1930 (Rec. pp. 160, 162, 173).

At page 111 of the Record there is the sworn statement of the Princess Lida in the Federal Court as follows:

> "Respondent avers that any accounts of Petitioners now pending in the Court of Common Pleas of Fayette County, Pennsylvania, sitting in Equity, have been ex parte proceedings, *and have been filed without notice to Respondent and the other beneficiaries of the trusts involved.*"

The Federal Court expressly found (Opinion, Appendix A, p. 28):

> "True, the trustees did file two accounts in the Court of Common Pleas, but that was a voluntary act on their part. There is no provision in the trust agreement for filing such accounts in Court, nor is there any provision in the decrees of the court for such accounts to be filed."

On the argument, opposing counsel contended that the filing of these accounts constituted institution of an accounting suit and that this gave the Common Pleas Court plenary and exclusive jurisdiction. Both the premise and conclusion of this argument are mistaken.

Aside from the fact that acquisition of jurisdiction over these petitioners by the service of process is not shown, the mere filing of the account on July 7, 1930, did not constitute the institution of any suit or confer exclusive jurisdiction as against the Federal suit and did not and could not bar the jurisdiction acquired by the Federal Court through the filing of the bill of complaint on the following day.

This was the explicit interpretation of the Pennsylvania law adopted by this Court in a substantially identical situation in *Shelby* v. *Bacon*, 10 How. (U. S.) 56.

There, under the Pennsylvania Statute authorizing trustees and assignees for the benefit of creditors to file accounts with the prothonotary's office of the court, assignees of a Pennsylvania bank filed an account which was confirmed by the Court. Subsequently, a citizen of Kentucky filed in the Federal Court in Pennsylvania a bill against the assignees "*for an account of the trust* and for the payment of complainant's debt in full or a distributive share thereof" (p. 57). The assignees challenged the jurisdiction of the Federal Court and pleaded in abatement and in bar the State Court's prior "confirmation" of their accounts and the alleged prior and exclusive jurisdiction of the State Court.

Thus, the precise question which we have here was presented. The Federal Court held that the proceedings in the State Court did not constitute a suit *in rem* and did not give the State Court primary, much less exclusive, jurisdiction, and that the Federal Court had jurisdiction to proceed.

These rulings were confirmed by this Court which said (pp. 70-71):

> "*It (the proceeding in the State Court), is not strictly a proceeding in rem.* The proceeding is in-

tended to adjust the rights of debtors and creditors of the Bank, beyond the jurisdiction of the State of Pennsylvania. Citizens residing, perhaps, in a majority of the States of the Union are debtors or creditors of the Bank. It is difficult to perceive by what mode of procedure the State of Pennsylvania can obtain and exercise an exclusive jurisdiction over the rights of persons thus situated. From the plea, it does not appear that any notices have been given, or citations issued, as authorized by the Statute. Nothing more seems to have been done by the assignees than to file their accounts, have them referred to auditors, and finally sanctioned by the court. Whether this procedure is evidence of a faithful discharge of the trust so far as the accounts have been so adjusted, it is not necessary to inquire. We suppose that it could not be contended that fraud or collusion might not be shown to avoid the proceeding before any tribunal having jurisdiction."

"*No suit seems to be pending in the Common Pleas.* The action of the assignees appears to be voluntary, for their own justification, and not in obedience to any order of the Court. By the Statute, any person interested may, on application to the Court, obtain a citation to the assignees to appear and answer. But this is nothing more than the ordinary exercise of a Chancery power to compel them to account. And it is only an exercise of jurisdiction over them from the time the bill is filed and a notice served, or the application for a citation is made on due notice. *If no such proceeding is had, the assignees, it would appear, file their accounts or omit to do so at their pleasure.*"

The nature of the questions certified to this Court by the Circuit Court is shown by the Order entered by this Court on the foregoing opinion. Such order appears at the end of the opinion of this Court, and the pertinent portions thereof are as follows:

"On consideration whereof, it is the opinion of this court, 1st. That the facts stated in the amended plea to the amended bill filed by John Bacon, Alexander Symington and Thomas Robins, do not deprive the said Circuit Court of jurisdiction of this case, 2d. That the facts stated in the plea to the amended bill filed by the defendants James Robertson, Richard H. Bayard, James S. Newbold, Herman Cope and Thomas S. Taylor do not deprive the said Circuit Court of jurisdiction of this case.".

III

The doctrine of *Shelby* v. *Bacon* has been constantly applied to accounting actions; and, unless there is property in the custody of the State Courts, the right of a nonresident to his statutory remedy in the Federal Court has been invariably upheld.

A leading example of the application of *Shelby* v. *Bacon* to accounting actions is *Powers* v. *Blue Grass Bldg. & Loan Assn.*, 86 Fed. 705. There a corporation had made an assignment to one Clay for the benefit of creditors. Under the Kentucky statute the assignee was required to give a bond in the County Court and to submit his accounts to that court. He also had the statutory right to apply to that court for directions. Under that statute, the assignee did file in the County Court a petition "for direction in the conduct of his trust and for settlement of his accounts." Thereafter certain stockholders brought suit in the Federal Court to set aside the assignment to him and to restore the assets to the corporation; and they applied therein to the Federal Court for a receiver *pendente lite*.

The Federal Court cited *Shelby* v. *Bacon*, and granted the application for appointment of a receiver, holding that

the proceedings by the assignee in the State Court had not as yet resulted in the passing to the State Court of any property but remained merely an ordinary proceeding by the assignee of the assets for a voluntary accounting. The Federal Court (LURTON, *C. J.*) said (p. 709):

> "He (the assignee for creditors) remained in possession of the res after he filed that petition as assignee under the deed, and not under any appointment by or authority from the circuit court. * * * The object of that petition was to administer his trust under the advice and direction of that Court. He submitted to it the construction of the deed and the rights of the different classes of shareholders for adjudication, and brought before the court as defendants one of each class to stand for and represent the class in settling rights under the deed inter sese. *The pendency of that suit has not placed the property of the association in grimeo legis.* Clay is just as completely in possession of the assets as he was the day before his suit was filed. He is in possession as assignee, and not as a mere hand of the court."

This decision and language are squarely applicable to the present case, because even if the act of the trustees in filing their second partial account on July 7, 1930, constituted the commencement of an accounting suit, no property was thereby placed "*in grimeo legis*", and the trustees remained "as completely in possession of the assets" as they were the day before such supposed suit was begun. Their possession was as trustees under the 1906 agreement and "not as a mere hand of the court."

In *Andrews* v. *Smith*, 5 Fed. 833, in a Federal suit by the first mortgage bondholders of a railroad against the mortgage trustees for an accounting of the trust funds, the defendants pleaded that during the period of the ac-

counting called for they had been in possession of the railroad as receivers for the Vermont Court of Chancery, and as such receivers had already rendered an account to that court for the sums claimed in the Federal suit. They also pleaded that no order discharging them as receivers of the State Court had ever been entered. Nevertheless, the Federal Court held that the receivership action in the State Court had practically ceased prior to the institution of the Federal action; and further held that a certain compromise agreement which had been made in the State Court and confirmed there by a decree adjudging it legal and binding on all parties interested in the railroad did not exclude the Federal court from assuming jurisdiction. To quote the opinion of WHEELER, *D. J.* (p. 840):

> "The putting the agreement in the form of a decree added nothing to the force and effect which the agreement would otherwise have."

This language fits directly the decrees of 1911 and 1915 in the present case.

Judge WHEELER then cited *Shelby* v. *Bacon*, 10 How. 56 (p. 842) and a number of other decisions by this Court, and deduced therefrom the rule (p. 844):

> "Unless the Court of Chancery had jurisdiction of this matter, *because these funds were in the custody of that court*, the accounting being had is not, upon any mode of procedure, to bind those not expressly parties to it."

And Judge WHEELER further said (p. 841):

> "That the state court may have jurisdiction of some of the parties to this suit, concerning the property involved, for some purposes, would not necessarily exclude this court from cognizance of the same parties in a suit relating to the same property for other purposes."

Similar applications of the doctrine of *Shelby* v. *Bacon* will be found in

Griswold v. *Central Vt. R. Co.*, 9 Fed. 797, 799;
Fleisher v. *Greenwald*, 20 Fed. 547, 550.

IV

The suit begun in the Federal Court by the filing of the bill in equity on July 8, 1930, had priority in point of time over any accounting proceedings which may have followed the filing of the partial account on July 7, 1930.

The Federal Court was the first to acquire jurisdiction.

The bill in equity was filed in the Federal Court on July 8, 1930. (See admission in Respondent's Brief, p. 5, and Rec. pp. 160, 162, 173.) By that act, as is elementary, the jurisdiction of the Federal Court was then invoked and immediately attached without more.

In *Farmers' Loan & Trust Co.* v. *Lake St. Rd. Co.*, 177 U. S. 51, this Court said (p. 60):

> "The contention that the jurisdiction of the state court first attached because, although the suit therein was not commenced till after the commencement of the suit in the Federal court, the summons issued by the state court was served before the service of the writ of subpoena issued by the Federal court, is not well founded.
>
> "*A suit in equity is commenced by filing a bill of complaint.* Story's Equity Pleading, sec. 7, fourth edition."

Furthermore, the trustees admit that they were duly served with process on the Federal bill (Rec. pp. 160, 162).

On the other hand, on the state side, all that happened at that time was the mere filing of a "second and partial account" on July 7, 1930 (Rec. p. 7).

There is no mention or claim of the presentation to the State Court of any petition or the making by it of any order on that day or on the following day.

The only reference to a petition which refers to the account is in the following entry on the docket (Rec. p. 7):

> "And now, to-wit, the 26th day of July, 1930, the petition presented in open Court and ordered to be filed, and it is further ordered that the time for filing Exceptions to the said account be extended as to all parties in interest to 15 days after the disposition of the petition."

The only notation as to the filing of exceptions is under date of February 16, 1931, and mentions exceptions then filed by one Gerald Purcell Fitzgerald, not one of these petitioners (Rec. p. 8).

The mere filing of the account on July 7, 1930, unaccompanied by the presentation of any petition or the issue of any process, did not institute a suit or confer any jurisdiction on the State Court,—much less an exclusive jurisdiction which would exclude the jurisdiction of the Federal Court attaching the next day. See next Point.

The burden of showing an exclusive and prior jurisdiction in the State Court is on the Respondents.

These Petitioners exercised their statutory right to sue in the Federal Court. The jurisdictional requirements were all met.

Hence, the burden was and is on the Respondents to show the right and power of the State Court to enjoin the Petitioners from exercising their lawful statutory right.

The Respondents cannot discharge this burden by mere guesses or assumptions or by going outside the Record. They cannot build up such an exclusive jurisdiction in the State Court by mere argument or speculation not sustained and proven by actual facts and proceedings plainly shown in this Record.

V

Under the Pennsylvania statute the mere filing of a partial account by trustees does not work the immediate institution of a suit or the immediate creation of present jurisdiction in the Court.

The subject of "Trusts and Trustees Generally" is covered in Title 20 of Purdon's Pennsylvania Statutes Annotated, sections 2741 to 3291.

The "voluntary settlement of accounts" is dealt with in section 2925. This requires an order of the Court granting "leave" and the presentation of a petition for an order for the issue and service of citation to and upon all persons interested in the estate.

This section expressly provides that, after "leave" first obtained, and after the account has been "filed in the office of the prothonotary of the court," "the like proceedings shall be had thereon as in the case of a settlement of such accounts after citation."

This refers back to section 2833, entitled "Citation to settle accounts." That section requires "*the application by bill or petition setting forth the facts,*" and the making thereon of an order "to issue a citation" to those in interest to answer the bill or petition.

Until such petition is presented and process ordered, no suit is deemed begun and no jurisdiction has been

acquired or constitutionally could be acquired (*Miller's Estate*, 10 W. N. C. 81).

In the present instance, the record does not show the presentation of any such petition or the obtaining of any leave or the making of any order for the issue of citation, before the institution of the federal suit on July 8, 1930; and it does not show the service of any citation upon these Petitioners at any time. They have positively denied such service and any notice of the filing of these two "partial accounts" (Rec. p. 111).

VI

The argument in Respondents' brief that the trust fund was "created by the decree of the State Court" is erroneous and a mis-description.

The Respondents' brief at pages 16 and 17 states that "The lien was established by the original decree in this cause", and that "The Trust Fund" was "created by the decree of the State Court".

This is a mis-description.

The decision of the State Court rendered in 1911 stated the issue to be whether *the 1906 agreement* did "create a lien" (Rec. p. 52). The conclusion of the Court was (Rec. p. 90):

> "We are therefore of opinion and conclude that *the agreement of December 6, 1906, creates an equitable lien* on the individual interest of the said Gerald Purcell Fitzgerald of and in the said Fayette Coke Company".

The modifying decree of 1915, by permitting the settlor to substitute as security a mortgage in place of

this equitable lien did not "create a trust fund". The trust fund—and the only trust fund—was the *money* paid by the settlor to the trustees. The mortgage was merely security for his obligation to pay that money.

In short, it was the 1906 agreement and the modifying agreement on which the modifying decree of 1915 was expressly based (Rec. p. 97), which *created* the trust funds. The decrees merely *enforced* the agreement. (See cases cited under Point III, *supra*.)

Furthermore, as the respondents have expressly admitted in this Record (p. 150), all that money was paid over in full and in consequence *"the mortgage was paid and satisfied"* and the decrees satisfied years before the Federal suit was ever begun. (See also page 6 of our Main Brief.)

VII

There is nothing in the amended decree of 1915 which gave the State Court continuing and exclusive jurisdiction over all future wrongs by any future trustees during the entire future life of this trust.

The theory that the 1910 suit was a suit in perpetuity seems to us absurd.

On the argument respondents' counsel referred to the clause in the modifying decree of March 5, 1915, which declared that the sums paid into the fund shall be invested by the trustees "in good, safe interest-bearing, lawful and secure trust securities", and that the trustees shall apply the net income therefrom to the payment of the annuity, etc. (Rec. pp. 99-100).

But this clause was merely declaratory of the law and of the 1906 agreement, and a mere summary of the obli-

gations of the trustees under the 1906 agreement, for the carrying out of which *"according to the true intent and meaning thereof"*, the modifying decree professed itself to be made (Rec. p. 99).

This modifying decree was entered *ex parte*, merely upon a petition of the then trustees (Rec. p. 94). It merely gave expression to an amplifying agreement set forth in that petition (Rec. p. 97). There is nothing to show that the beneficiaries of the trusts were given any notice of that petition. The petition set forth an agreement between the settlor of the trusts and the then trustees for the substitution of a fixed mortgage in the place of the equitable lien created by the 1906 agreement (Rec. p. 97). All that the modifying decree did in substance was to confirm *by consent* that substitution. (See cases cited under Point III, *supra*.)

The clause thereof quoted by Respondents' counsel merely declares in substance that the trustees shall have as to the mortgage the same duties as they had as to the equitable lien.

The modifying decree does not create any fund *in custodia legis*. It does not convert the trustees into receivers of or for the Court. Their title and possession still rested on the 1906 agreement. The mere fact that it gave to the trustees certain directions which were declaratory of the law and inherent in the agreement did not convert the suit into one *in rem* or in perpetuity or bring any property into the custody of the Court.

The modifying decree expresses no reservation of jurisdiction for any purpose whatsoever. It does not order the trustees to account or refer to any account by them. Once again, all that the modifying decree added to the prior situation was a further definition of the duty and obligation of the settlor.

The modifying decree expressly so acknowledges, for it declares its sole purpose to be (Rec. p. 99):

> "that the same (the 1911 decree) may be better enforced and the provisions of said Indenture of December 6, 1906, carried out *according to the true intent and meaning thereof.*"

And the petition on which the same was based expressly declared that by the proposed modification (Rec. p. 98):

> *"the true intent and purpose of said paragraphs 2 and 3 of said Indenture will be effected."*

VIII

The decrees of 1911 and 1915 were fully satisfied, and the only cause of action which was pleaded and which these decrees purported to enforce was fully satisfied, on or before May 25, 1925.

On the argument respondents' counsel claimed that the equitable lien and the mortgage later substituted therefor was "a trust fund created by the State Court".

Not at all! These were mere security for the creation of the trust funds by and as provided for in the 1906 agreement.

The trust funds consisted of monies paid over to the trustees by the settlor, and when these had all been paid in full as required by that agreement on or prior to May 25, 1925, the equitable lien and the mortgage ceased and died.

To what we have said on this subject on page 6 of our Main Brief, we add the following admission *by the respondents* on page 150 of the Record:

"Pursuant to the said (1915) decree the payments therein required were made, the mortgage executed and delivered, the principal of the Children's Fund fully realized, *the mortgage paid and satisfied.*"

Dated, November 21st, 1938.

Respectfully submitted,

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